

Docket No. 05-35264

MAY 09 2005

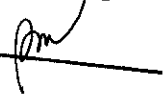
UNITED STATES COURT OF APPEALS

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FOR THE NINTH CIRCUIT

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MAY - 9 2005

INITIAL 

RANCHERS CATTLEMEN ACTION
LEGAL FUND UNITED
STOCKGROWERS OF AMERICA,

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, Animal and Plant
Health Inspection Service; et al.,

Defendants-Appellants.

Appeal from
D.C. No. CV-05-00006-RFC
District of Montana,
Billings

**AMICUS CURIAE
APPLICANT EASTERDAY
RANCHES, INC.'S REPLY TO
R-CALF'S OPPOSITION TO
MOTION FOR LEAVE TO
FILE AMICUS BRIEF**

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On April 21, 2005, Easterday Ranches, Inc. (Easterday) filed a motion seeking leave to file an amicus curiae brief in this appeal. On April 30, 2005, Plaintiff-Appellee Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF) filed a response opposing Easterday's motion, and that of all other amicus applicants. Easterday hereby respectfully replies to R-CALF's response.

R-CALF's effort to prevent any segment of the livestock industry, other than itself, from addressing this Court are relentless. R-CALF broadly opposes any amicus brief being filed in this appeal because, it argues, "[t]he briefs largely restate arguments already made in USDA's brief" R-CALF Opposition to Motions for Leave to File Amicus Briefs, p. 4. And: "Because the *Amici Curiae*'s arguments are similar to those made by USDA, they are also similar to each other." R-CALF Opposition to Motions for Leave to File Amicus Briefs, p. 12. However, saying the briefs are duplicative does not make it so.

For example, Easterday devotes its brief to a discussion of the unique adverse impacts the preliminary injunction has on cattle feeders, particularly in the Pacific Northwest, and the structural threat to the cattle industry in the Northwest resulting from continued closure of the border to the importation of

safe, Canadian cattle. (Other amicus applicants likewise discuss the economic impacts of the preliminary injunction on their companies and industry sectors.)

Easterday's discussion does not duplicate the USDA brief. The USDA's argument only alludes to the impacts on other industry sectors, without any specifics. In the summary of its argument, the USDA states:

Although the court speculated that its injunction might avoid economic harm to plaintiffs, it is beyond dispute that the continued restrictions on imports results in enormous hardship to the domestic meat processing industry. The injunction enhances the economic position of the plaintiffs, who are its only real beneficiary, while inflicting harm on others.

Brief for Appellants, pp. 14-15. In the body of its argument, the USDA makes a similar general remark:

Although the district court gave great weight to possible economic harm to ranchers that might occur under the new rule, it ignored the countervailing harms to other sectors of the economy that flow from the injunction. For example, the district court speculated, without apparent basis, that entry of Canadian beef into the U.S. will cause other countries to close (or keep closed) their borders to American cattle and beef, resulting in economic harm. ER 132 (Op. at 25). The court gave no weight, however, to the fact that USDA's rule would result in a net benefit to the U.S. economy. See ER 90-91 (Fillo Dec. ¶ 8) see also 70 Fed. Reg. at 518 (discussing the "positive impacts" the rule would have for the "wider economy").

Brief for Appellant's, p. 59.

That's it. The USDA brief has nothing further to say about the economic impact of the preliminary injunction on other industry sectors, or particular

geographic areas. It does not talk about the squeeze the injunction places on feeders, who buy light cattle from ranchers, finish the cattle, and then sell the fat cattle to packers. It does not talk about the threat to the industry in the Pacific Northwest of losing one of the three major packers in the region should the border remain closed. These particular economic impacts are addressed only by the amicus brief offered by Easterday.

Similarly, amici briefs offered by other applicants address the unique economic factors affecting their companies or industry segments. These briefs neither duplicate the USDA brief, nor each others'.

Even R-CALF, in its summary of the USDA brief, does not claim that the economic harm of the preliminary injunction to other segments of the industry played any significant role in that brief. See R-CALF Opposition to Motions for Leave to File Amicus Briefs, pp. 5-6.

Finally, R-CALF argues that this Court should not consider the documents attached to Easterday's brief that discuss the unique circumstances facing the industry in the Pacific Northwest that make this region's industry particularly vulnerable should the importation ban continue. R-CALF Opposition to Motions for Leave to File Amicus Briefs, p. 19. R-CALF's reliance on *Wiggins Bros., Inc. v. Dep't of Energy*, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1982) and *Petition of Oskar Tiedemann & Co.*, 289 F.2d 237,

240, n. 5 (3d Cir. 1961) are inapposite. Both cases involved amici who sought to introduce evidence. However, Easterday expressly disavows any notion that the documents it presents with its amicus brief are evidence. As Easterday states in a footnote to its proposed brief:

This statement is outside of the record considered by the district court, as are some other sources relied upon in this brief. Easterday Ranches recognizes that this material is no substitute for the record. However, materials outside the record may be particularly helpful to the Court's understanding of the economics of the cattle industry. Courts have relied upon such outside-the-record material at least since Louis D. Brandeis presented the first so-called "Brandeis brief" in *Muller v. State of Oregon*, 208 U.S. 412, 419, 28 S.Ct. 324, 52 L.Ed. 551 (1908) ("Then follow extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization.").

[Proposed] Brief of Amicus Curiae Easterday Ranches, Inc., p. 6, n. 3.

The fundamental issue before this Court, in deciding whether to accept the amicus briefs offered by Easterday and others is whether those briefs may assist this Court in understanding the issues being litigated between the USDA and R-CALF. Particularly in a case such as this, with its far-reaching economic impacts on the cattle industry in the United States, it is important that this Court appreciate the backdrop of overall economic harm to virtually everyone in the

industry except R-CALF. This backdrop is not being presented by the USDA, and certainly not by R-CALF.

Therefore, Easterday respectfully requests that this Court grant its motion for leave to file an amicus brief.

RESPECTFULLY submitted this 6th day of May, 2005.

McELROY LAW FIRM, PLLC


Michael B. Gillett
Attorney for Easterday Ranches, Inc.

CERTIFICATE OF SERVICE

I, MICHAEL B. GILLETT, hereby certify that on the 6th day of May 2005, I have caused a true and accurate copy of the Amicus Curiae Applicant Easterday Ranches, Inc.'s Reply to R-CALF's Opposition to Motion for Leave to File Amicus Brief, to be served by overnight delivery upon:

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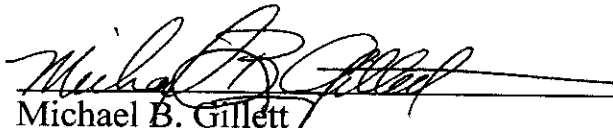
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DATED this 6th day of May, 2005.

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